

IBLA 85-306, et al.

Decided July 2, 1987

Appeals from decisions of the Director, Minerals Management Service, affirming amendment of Notice to Lessees and Operators regarding royalty payments for Outer Continental Shelf oil and gas leases, dismissing with prejudice appeal of requirement for certification in connection with royalty refund request, and affirming denial of a request for refund of royalties paid for gas used off-lease.

MMS-82-0402-OCS et al.

Referred for hearing.

1. Oil and Gas Leases: Royalties -- Outer Continental Shelf Lands Act:
Oil and Gas Leases -- Regulations: Generally

A hearing will be ordered where the record is not clear whether before 1974 the Department exempted oil or gas produced from leases on the Outer Continental Shelf from royalty if it was used for production or operations outside the lease or unit from which it was produced.

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OPINION BY ADMINISTRATIVE JUDGE IRWIN

Exxon Company, U.S.A. and others have appealed from decisions of the Director, Minerals Management Service (MMS), dated December 10, 1984, March 15 and April 16, 1985, and December 23, 1986, affirming an amendment of a Notice to Lessees and Operators (NTL) regarding royalty payments for Outer Continental shelf (OCS) oil and gas leases, dismissing with prejudice an appeal of a requirement for certification in connection with a royalty refund request, and affirming the denial of a request for a refund of royalties paid for gas used off-lease. ^{1/} These appeals present the common issue whether the holder of an OCS oil and gas lease is required to pay royalty on oil and gas produced from the lease but used for purposes of production from or operations outside the lease or unit area.

^{1/} The appellants are: Exxon Company, U.S.A. (Exxon), IBLA 85-306 (MMS-82-0402-OCS) and IBLA 87-321 (MMS-85-0178-OCS); Gulf Oil Corporation (Gulf), IBLA 85-612 (MMS-82-0404-OCS); Texaco, Inc. (Texaco), IBLA 85-704 (MMS-82-0402-OCS); Mobil Oil Corporation, Mobil Producing Texas & New Mexico, Inc., and Mobil Oil Exploration and Producing southeast, Inc. (MOEPSI), IBLA 85-705 (MMS-82-0403-OCS); and MOEPSI, IBLA 85-730 (MMS-83-0032-OCS). Appellants are all holders of OCS oil and gas leases in the Gulf of Mexico, issued pursuant to section 8 of

Section 8(a) of the Outer Continental Shelf Lands Act (the Act), as amended, 43 U.S.C. § 1337(a)(1)(A) (1982), has, since its enactment on August 7, 1953, provided authority for the Secretary of the Interior to set a royalty of not less than 12-1/2 percent "in amount or value of the production saved, removed, or sold." (Emphasis added.) See 67 Stat. 468 (1953). The statute does not itself define, for purposes of royalty computation, what oil and gas will be considered "saved, removed, or sold." This has been largely a matter of Departmental interpretation, as set forth below.

In NTL 74-14, dated June 28, 1974, the Acting Oil and Gas Supervisor, Gulf of Mexico Area, Geological Survey (Survey), stated that, effective June 1, 1974, royalty would be due "on the value of all oil and gas * * * lost in spills, blow outs, and fires, and on the value of all gas * * * flared and vented." The only "lease use" gas excepted by this Notice from the payment of royalty was gas "re injected * * * in a manner which will render [it] reasonably subject to extraction again".

NTL 74-14 was superseded by NTL 74-20, dated October 25, 1974, which provided that, effective June 1, 1974, royalty would be due "on all oil and gas produced from all OCS leases [in the Gulf of Mexico area], except gas production as provided in paragraph 3 of this Notice." 39 FR 38685 (Nov. 1, 1974). Paragraph 3.A.(2), entitled "Other Lease Use", provided that for certain leases issued pursuant to section 8 of the Act:

fn. 1 (continued)

the Outer Continental Shelf Lands Act, as amended, 43 U.S.C. § 1337 (1982). Because of the substantial similarity of legal and factual issues involved, these cases were consolidated by orders dated July 17 and 18, 1985, and May 15, 1987, at the parties' request.

Gas produced pursuant to a lease or unit agreement and used for operations or production activities pursuant to that same lease or unit agreement as a fuel or otherwise in the operation of machinery or equipment shall not be subject to royalty, unless it is a use which the Supervisor has prohibited. [Emphasis added.]

The preamble to the Notice stated that this permission for "use of gas for lease purposes without the payment of royalty" applied only to "those leases which provide that 'gas used for purposes of production from and operations upon the leased area or unavoidably lost' is not subject to royalty." "However," the preamble noted, "this is subject to possible change after review of this provision by the Comptroller General."

On October 4, 1976, in Response to February 17, 1976, Request from the General Accounting Office: Interpretation of Mineral Leasing Act of 1920, and Outer Continental Shelf Lands Act Royalty Clause, 84 I.D. 54, 60 (1976), the Solicitor, in an opinion approved by the Secretary, concluded that under the Act the Department "must collect royalty on all substances withdrawn from the reservoir." The Solicitor defined the statutory term "removed" as including oil or gas

which is physically transported from the lease, as well as oil or gas, which is reinjected into a formation under the lease or which, through an action or failure to act by the lessee, is lost from the lease by escape through venting or leakage, through consumption in a flare or as fuel for leasehold production equipment. [Emphasis added.]

The Solicitor recommended that this interpretation of the Act only have prospective effect "beginning June 28, 1974," because of past reliance by lessees

on Departmental regulations and lease forms. Id. at 55, 63-64. The Solicitor's opinion was incorporated into NTL 78-5, dated March 20, 1978, which superseded NTL 74-20. 2/

Effective January 12, 1981, the Department promulgated amended regulations dealing with royalty payable on oil and unprocessed gas whose purpose was to "delete the language that currently indicates that royalty is due on all oil and gas removed from the reservoir." 45 FR 81563 (Dec. 11, 1980).

3/ These amended regulations specifically provided that "royalty is due" on all oil and gas which is "produced from a reservoir and used by the lessee for purposes of production from and operations upon the lease or unit area, or operations outside the lease or unit area, unless otherwise provided for in the lease." 30 CFR 250.65(b) and 30 CFR 250.66 (45 FR 81563 (Dec. 11, 1980)) (emphasis added). 4/

2/ NTL 78-5 stated in part:

"Effective June 28, 1974, royalty is due and payable in amount or value of all oil or gas, or both, that is withdrawn from a reservoir which is subject to an OCS oil and gas lease. More specifically, royalty is due on vented and flared gas, and gas or oil, or both, leaked, spilled or used in producing operations. * * * Gas produced pursuant to a lease or unit agreement and used for operations or production activities as a fuel or otherwise in the operation of machinery or equipment shall also be subject to royalty."

3/ This language had been added as the first part of 30 CFR 250.65(b) and 250.66 effective Dec. 13, 1979, with the following explanation:

"Several respondents objected to including oil used as fuel in the computation of royalty. Since this question currently is the subject of litigation [Amoco Production Co. v. Andrus, No. 77-3351-C (E.D. La.)], they recommended that the language in the existing regulations not be changed pending a decision by the court. Since regulations implement administration policy as well as statutory mandates, we believe it is appropriate for the language of the final rule to be consistent with the Department's policy on this matter, and have, therefore, rejected this recommendation." 44 FR 61891 (Oct. 26, 1979).

4/ The regulations were redesignated as 30 CFR 202.150(b) and 206.151 respectively effective Aug. 5, 1983. 48 FR 35641 (Aug. 5, 1983).

Effective on the same date, MMS 5/ published an NTL dated November 19, 1980, "that implements the regulations." 45 FR 81563 (Dec. 11, 1980). However, the NTL distinguished between leases issued prior to and after July 1, 1974. The NTL provided, for leases issued on or before July 1, 1974: "[R]oyalty is not due on gas used for purposes of production from and operations within or outside the lease or unit area. Royalty is due on all other oil and gas production * * *." (Emphasis added.) 45 FR 81670 (Dec. 11, 1980). For leases issued after July 1, 1974, the NTL provided that "royalty is due on all other oil and gas production, including * * * oil or gas used for purposes of production from and operations within or outside the lease or unit area." Id. 6/

In Amoco Production Co. v. Andrus, 527 F. Supp. 790, 791 (E.D. La. 1981), decided November 27, 1981, the U.S. District Court concluded that the Department could not, consistent with the Act, require a lessee to pay

5/ By Secretarial Order No. 3071 of Jan. 19, 1982, amended May 10, 1982, the minerals management functions previously carried out by the Survey were transferred to the MMS. See 47 FR 4751 (Feb. 2, 1982).

6/ These provisions were prefaced by the following comment:

"Several commenters stated that oil or gas used in lease operations should not be subject to royalty payment regardless of when the lease was issued, and cited the Mineral Leasing Act as support. We do not agree. The OCS Lands Act, as amended, does not specifically exempt from being subject to royalty, oil or gas produced from and used on the lease for production purposes, as do Sections 18 and 19 of the Mineral Leasing Act. In addition, with regard to OCS leases, we are not attempting to collect royalty on gas in contravention of a specific lease term, but only on gas used from production purposes on leases which do not exempt such gas from royalty payments. The Department having reconsidered the royalty requirements of lessees [sic] of OCS leases has determined that it is legally correct to collect royalty on oil and gas used for production purposes unless the lease terms exempt such oil and gas from royalty."

45 FR 61670 (Dec. 11, 1980). Comments on the proposed notice had been requested on Aug. 13, 1980, 45 FR 53877 (Aug. 13, 1980).

a royalty on oil and gas "which are vented or flared, used in leasehold operations, or unavoidably lost." (Emphasis added.) The court took note of the 1974 NTL's, as well as the Solicitor's opinion, but held that they were a departure from a "long-standing policy and practice of not collecting royalties" on oil and gas used in leasehold operations with respect to the offshore production of oil and gas, which policy and practice Congress implicitly approved in enacting section 8 of the Act. Id. at 792, 794. The court, therefore, declared the 1974 NTL's "invalid" and dismissed Departmental decisions which had upheld the notices. Id. at 796.

In an effort to reflect the court's ruling in Amoco, the Acting Associate Chief, Offshore Minerals Management Division, MMS, issued an NTL, dated May 5, 1982, which superseded the January 1981 NTL. 47 FR 20672 (May 13, 1982). This NTL, which was effective June 1, 1982, provided that: "Effective June 1, 1974, royalty is not due on * * * oil and gas used for purposes of production from and operations within or outside the lease or unit area." Id. (Emphasis added). However, on July 26, 1986, the Acting Associate Director for Offshore Minerals Management, MMS, amended the NTL to delete the language "or outside" effective September 22, 1982. 47 FR 36717 (Aug. 23, 1982). MMS explained:

It was not intended to exclude such oil or gas used outside the lease or unit area from royalty obligation. We are aware of no usual provision or custom which permits the transfer of a hydrocarbon product outside a lease or unit area without royalty considerations.

The purpose of the proposed change is to remove this unintentional exclusion. [7/]

In September 1982, Exxon, Gulf, Texaco, and Mobil Oil challenged the July 1982 MMS decision. These challenges constituted appeals to the Director, MMS, pursuant to 30 CFR 250.81 and Part 290. Appellants challenged the July 1982 MMS decision on the basis that it constituted a substantive change from past accepted practice by the Department that no royalty would be charged for oil and gas used outside a lease or unit area but for the benefit of that lease or unit, which change was promulgated without complying with the procedural requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982), and was inconsistent with the court's ruling in Amoco Production Co. v. Andrus, supra. Mobil Oil, for example, explained in its September 21, 1982, notice of appeal, at page 2:

It is the custom in the Gulf of Mexico and elsewhere for appellants and other operators to construct central platform facilities, which house separation and other equipment used to gather production from satellite wells either within or outside

7/ In April 1981, the Geological Survey made a similar deletion concerning the exemption from royalties of gas or liquids reinjected into a reservoir provided in 30 CFR 250.66 and the implementing notice effective in January 1981. The second sentence of the regulation originally read: "Royalty is not due on gas or liquids produced from and reinjected to a reservoir, either within or outside the same lease or unit, until such time as they are finally produced from a reservoir." See 45 FR 81563 (Dec. 11, 1980). (Emphasis added.) The emphasized words were deleted from the regulation and the notice. See 46 FR 19935 (Apr. 2, 1981); 46 FR 22468 (Apr. 17, 1981). The revision of the notice was explained as follows:

"A final NTL concerning produced oil and gas that is to be exempt from royalty requirements was published in the Federal Register on December 11, 1980, (Vol. 45 No. 240). Subsequent to the publication of this NTL it was discovered that language was inadvertently included that indicated that gas or liquids to be used for reinjection or other lease use could be used for such purposes outside the lease or unit area. The NTL as written could conceivably lead to the transfer to custody of such gas or liquids and could

of the leased premises on which the central facility is located. Current royalty payment practice allocates back to the several separate leases the share of fuel use gas and oil actually used on one lease block where the central facility is sited. No royalty is paid on any fuel use oil or gas allocated to any lease served by the facilities regardless of the location of the facilities. A strict interpretation of the NTL change of August 23, 1982 would result in the oil or gas used outside the boundaries of the producing lease being subject to royalty.

Gulf, in its September 20, 1982, notice of appeal, at page 6, also argued that: "The change published on August 23, 1982, would literally mean that while no royalty would be due on fuel gas used for the lease where the platform was located, royalty would be due on fuel gas used for the other lease."

In his December 1984 and March 1985 decisions, the Director, MMS, affirmed the July 1982 decision deleting the royalty exclusion for oil and gas used for purposes of production from and operations outside the lease or unit area. The Director acknowledged that royalties had not been collected on oil or gas used by the lessee or operator for production purposes "on the same lease or within an approved unit encompassing such lease" until 1974. He also acknowledged that the Amoco decision held that the Department's 1974 policy change subjecting such oil and gas to royalties was unlawful, and that the term "removed" in 30 U.S.C. § 1337(a) (1982) was to be construed as it

fn. 7 (continued)

thus create accounting problems, i.e., accountability if the injected gas or liquids are not recovered. We are aware of no usual provision or custom which permits transfer of custody of a hydrocarbon product outside a lease or unit area without royalty consideration. The language that would allow such action was inadvertent and did not appear in the proposed NTL published for comment (see Federal Register publication, August 13, 1980, Vol. 45, No. 158) and was not in the discussion of comments in the Federal Register issue that published the final NTL."

46 FR 22468 (Apr. 17, 1981). [Emphasis in original].

traditionally had been under the Mineral Lands Leasing Act. Accordingly, he stated, the Department "consistently required that section 8 [i.e., 30 U.S.C. § 1337] lessees and operators pay royalties on all OCS oil or gas removed from the lease for purposes of production outside the producing lease or outside a unit area encompassing such lease" until 1981. ^{8/} The NTL that became effective in January 1981 "purport[ing] to exempt from royalty requirements gas produced under section 8 leases issued on or before July 1, 1974, and used for purposes of production from and operations outside the producing lease or unit area" was based on a "clearly erroneous" determination that such leases expressly exempted such gas from royalties, the decision stated. ^{9/} Both the May 1982 notice implementing the Amoco decision and the July 1982 notice deleting the "outside" language from the May 1982 notice were not subject to the notice-and-comment rulemaking provisions of the APA, 5 U.S.C. § 553 (1982), the decision stated, because both were notices interpreting the existing rules at 30 CFR 202.150 and 206.151 rather than legislative rules. Those existing rules, the Director pointed out, "expressly require that royalty be paid on all oil and gas produced from a reservoir and used for operations outside the lease or unit area unless 'otherwise' provided

^{8/} The Department's practice reflects an established custom of the industry that "if [natural gas] were to be used off the premises or sold, then such gas had value and royalties were due," the decision states, citing Butler v. Exxon Corp., 559 S.W. 2d 410, 415 (Tex. Ct. App. (El Paso) 1977), and Lackey v. Ohio Oil Co., 138 F.2d 449, 451 (10th Cir. 1943). The decision in Butler was apparently later set aside, Exxon Corp. v. Butler, 619 S.W. 2d 399 (Tex. 1981), and its interpretation of the royalty clause disapproved in Exxon Corp. v. Middleton, 613 S.W. 2d 240 (Tex. 1981). See Williams & Meyers, 8 Oil & Gas Law, 831-32 (1984). Lackey involved an Oklahoma oil and gas lease that required lessee to pay lessor for gas produced from any oil well and used off the premises.

^{9/} Decision at 4-5. In fact, such leases only exempted "gas used for purposes of production from and operations upon the leased area," the decision stated.

for in the lease. No section 8 leases have been issued providing 'otherwise.'" The May 1982 notice excluding such oil and gas from royalty was a nullity, and MMS is not estopped from correcting the error in its July 1982 notice, which simply "reaffirm[ed] the lessees' existing obligations under the regulations," the Director concluded. The four appellants filed timely notices of appeal. 10/

[1] Appellants request a hearing on issues of fact in accordance with 43 CFR 4.415. They do so because they dispute the statement in the decision of the Director, MMS, that "until 1981" the Department had a "longstanding

10/ See note 1, supra. In IBLA 85-730, MOEPSI appeals from an April 1985 decision of the Director, MMS, which dismissed with prejudice an appeal from an Oct. 7, 1983, decision of the Acting Regional Supervisor for Royalty Management. In December 1982, appellant had submitted a request for a refund for royalties paid on gas produced from various OCS oil and gas leases in the Gulf of Mexico, including section 8 leases. By letter dated July 20, 1983, the Acting Regional Supervisor required appellant to certify that its refund request was in accordance with the July 1982 amended NTL, i.e., does not include "royalties paid on gas used outside the lease or unit area from which produced." (Emphasis in original.) Appellant responded in a Sept. 8, 1983, letter, referring to its earlier appeal of the amended NTL: "This is to certify that Mobil's refund request for royalties paid on lease use gas produced on Sec. 8 leases covers only produced gas that was used for the purpose of production from and operations for the benefit of the lease or unit area." The Acting Regional Supervisor then, in his October 1983 decision, concluded: "The substitute certification provided by your letter dated September 8, 1983, does not show conformity to the cited NTL. Therefore, the issuance of your refund check has been suspended pending the outcome of your appeal of the NTL." Appellant filed a "protective" appeal to the Director, MMS, from this decision, noting that the issues raised therein would be resolved by a decision on its earlier appeal. In his April 1985 decision, the Director, noting that he had already upheld the validity of the amended NTL in his March 1985 decision, dismissed appellant's appeal "with prejudice."

In IBLA 87-321, Exxon Company, U.S.A. appeals the portion of a Dec. 23, 1986, MMS decision that affirmed the denial of a request for a refund of royalty payments made for gas from section 8 leases that was used off-lease or off-unit. The MMS decision was based on the July 1982 notice that such gas was not excluded from royalties.

practice" of requiring that "section 8 lessees and operators pay royalties on all OCS oil or gas removed from the lease for purposes of production outside the producing lease or outside a unit area encompassing such lease." 11/ "From the time of adoption of [the] Act in 1953 until the issuance of the First Notice to Lessees on the subject in 1974, the government and, to appellant's knowledge, all of its lessees had interpreted ["production saved, removed, or sold"] as excluding lost and used hydrocarbons on and outside the lease or unit area from royalty obligations," states Gulf. 12/ The July 1982 notice "represented a substantive change to existing royalty payment practices associated with gas fuel usage," Exxon states. 13/ "The [July 1982] NTL * * * violates * * * the longstanding interpretation, practices and construction that the department charged with the execution of the statute had given it over the years," states Texaco. 14/ "From 1953 to 1974 both the government as lessor and Mobil as lessee interpreted the statutory and lease royalty provisions as exempting from the royalty obligation oil and gas used on central platform facilities and allocated lease use fuel back to producing wells located inside or outside the lease in which the central platform facility was situated," according to Mobil Oil Corporation. 15/

11/ See, e.g., Decision of Mar. 15, 1985, in MMS-82-0403-OCS, et al., at 3. 12/ Statement of Reasons of Gulf Oil Corporation at 8. "[A]ppellant, and other lessees, in contesting the subject notice and decision of the Director merely are seeking to maintain a long standing customary method of computing royalty and not attempting to reap benefits from that notice." Id. at 7.

13/ Notice of Appeal of Exxon Company, U.S.A., at 1.

14/ Statement of Reasons of Texaco, Inc., at 4.

15/ Statement of Reasons for Appeal of Mobil Oil Corporation, Mobil Producing Texas & New Mexico Inc., and Mobil Oil Exploration & Producing Southeast Inc., at 10. Mobil explains further:

"Mobil's custom, like that of other producers, is to construct in the OCS waters central platform facilities, which house separation and other equipment used to gather production from satellite wells located either within or outside the lease in which the central facility is located. Traditional royalty payment practice allocated oil and gas used as fuel on central platform facilities to each well feeding into the central facility, and those wells

Mobil submits an inter-office memorandum of a telephone conversation with the person listed as the principal author of the May and July 1982 notices as evidence of the Department's historic practice. The memorandum states that the elimination of the words "or outside" from the May 1982 notice "was not meant to exclude oil & gas used in producing operations on central facilities, gathering stations, and the like from the royalty exempt status. It was meant to prohibit one operator from selling oil & gas to be used in producing operations to another operation without paying MMS royalty on that oil & gas." 16/ (Emphasis in original.)

Mobil proposes that oral testimony from this person as well as accountants and officials from MMS and lessees who have been involved in OCS royalty accounting functions should be presented at a hearing to establish past agency practice on collecting royalties for lease fuel consumed on central platform facilities. 17/ Exxon argues that the information in the Mobil memorandum casts doubt on whether the inclusion of the words "or outside" in the May 1982 was in fact "unintentional," as MMS claimed in explaining its July 1982 deletion of those words, and suggests that documents and testimony on MMS' reasons for the change are necessary. 18/

fn. 15 (continued)

could be located within or outside the lease block in which is situated the central platform or facility." Id. at 2-3. See also Sept. 17, 1982, letter from Offshore Operators Committee to Acting Associate Director for Offshore Minerals Management, Exhibit B, Statement of Reasons for Appeal of Mobil Oil Corporation.

16/ Exhibit C, Statement of Reasons for Appeal for Mobil Oil Corporation, supra note 15.

17/ Statement of Reasons for Appeal for Mobil Oil Corporation, supra note 15, at 5-6.

18/ Notice of Appeal of Exxon Company, U.S.A., supra, note 13, at 3, 6. See text at note 7, supra.

In its Answer, MMS argues the Board can resolve the legal issues presented by these appeals 19/ without a hearing. MMS points to a memorandum in the record that states that before 1974 gas used as fuel outside the lease or unit area from which it was produced was subject to royalty payment. 20/ However, MMS acknowledges that "factual issues may exist as to past royalty accounting industry and agency practice for off-lease-use gas," 21/ and also points to a memorandum stating that "there still was a question as to whether Exxon and others were correct that the USGS [Survey] past practice exempted off-lease use" and that the MMS Assistant Director for Program Review had "spent several unsuccessful weeks trying to determine if past practice exempting such off-lease use production actually occurred." 22/ MMS states it does not believe such practice is determinative, because "the issue is the scope of the legal requirements established under section 8(a) of the OCSLA," but suggests that if the Board does order a hearing, then it should address how lessees and MMS have accounted for all off-lease-use gas in actual practice, not just gas used as fuel at central platform facilities. 23/

Under 43 CFR 4.415, the Board has discretion whether to refer a case to an Administrative Law Judge for a hearing on an issue of fact. We have held, in response to a request for a hearing, that

19/ These issues are (1) whether the July 1982 notice is valid in light of Amoco Production Co., supra; (2) whether the notice may be regarded as an interpretive rule not subject to notice-and-comment rulemaking procedures under 5 U.S.C. 553; and (3) whether the policy of requiring payment of royalties for off lease-use gas is rational (Answer of Minerals Management Service at 2).

20/ Answer of MMS, supra, note 19; Attachment D. The memo is dated Oct. 15, 1982, i.e., after the appeals to the Director of MMS from the July 1982 notice were filed.

21/ Id. at 26.

22/ Id., Attachment C.

23/ Id. at 26-27.

[a] hearing is not necessary in the absence of a material issue of fact, which if proven, would alter the disposition of the appeal. * * * This Board "should grant a hearing when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them." * * * [T]his Board has refused to grant a hearing where Geological Survey had reviewed the same information submitted to this Board and the dispute did not involve facts, but involves the proper application and interpretation of those facts.

Woods Petroleum Co., 86 IBLA 46, 55 (1985). See also Patricia C. Alker, 70 IBLA 211, 213 (1983). "A hearing is necessary only where there is a material issue of fact requiring resolution through the introduction of testimony and other evidence. In the absence of such an issue, no hearing is required." KernCo Drilling Co., 71 IBLA 53, 56 (1983). If a hearing is ordered, the Board will specify the issues upon which the hearing is to be held. Norman G. Lavery, 96 IBLA 294, 299 (1987).

A hearing is necessary to resolve these appeals because "[i]n deciding to use the phrase 'saved, removed or sold' in the royalty provision of the OCS Lands Act, Congress was aware of, and is presumed to have intended that the language be defined consistently with, the longstanding Interior Department interpretation of the 'removed or sold' language used in the royalty provision of its predecessor statute [the Mineral Lands Leasing Act, 30 U.S.C. § 181 et seq. (1982)]." Amoco Production Co. v. Andrus, supra at 794. The "pre-1974 interpretation of the OCS Lands Act" concerning whether gas or oil used for production off the lease was subject to royalty is important because courts reviewing the Department's oil and gas royalty decisions have regarded that interpretation as one with "implied legislative approval, * * * since [the OCS Lands Act] was enacted with an awareness by Congress of the administrative interpretation of the Mineral Lands Leasing Act excluding Lost and

Used Hydrocarbons from royalty obligations." Id. The pre-1974 interpretation is also of significance where the administrative practice at issue "involves a contemporaneous construction of a statute by the men charged with setting its machinery in motion" and where the "prior long standing" interpretation differs from "the more recent ad hoc contention of how the OCS Lands Act should be interpreted." Id. at 795-96. See Sutherland, Statutory Construction (1984 Revision), ch. 49. Cf. Placid Oil Co. v. U.S. Department of the Interior, 491 F. Supp. 895 (N. D. Texas 1980); Mesa Petroleum Co. v. U.S. Department of the Interior, 647 F. Supp. 1350 (W. D. La. 1986).

The records of these appeals, however, do not make clear what the Department's practices regarding royalty payments for oil or gas used off the lease were under the Mineral Lands Leasing Act -- or whether the Congress was aware of that practice -- or under the OCS Act before 1974 and our own research has not provided any satisfactory answer. 24/ Nor do we regard it as clear that the decision in Amoco Production Co., supra, governs the question of whether royalty is payable for off-lease-use gas. As Gulf states,

24/ See, e.g., Williams, 3 Oil and Gas Law 644.5. No comments accompanied the publication of 30 CFR 250.65 and 250.66 in proposed form (19 FR 790, 799, Feb. 11, 1954) or as finally adopted (19 FR 2659, May 11, 1954). These regulations were amended only once (in 1969), to add the language underlined below, before the amendments discussed in note 3, supra. After the 1969 amendments these regulations provided:

"§ 250.65 Royalty on oil.

"(a) The royalty on crude oil, including condensates separated from gas without the necessity of a manufacturing process, shall be the percentage of the value or amount of the crude oil produced from the leased lands established by law, regulation, or the provisions of the lease. No deduction shall be made for actual or theoretical transportation losses.

"(b) Royalty shall be based on production removed from the lease except that, when conditions so warrant, the supervisor may require such royalty to be based on actual monthly production. Evidence of all shipments shall be filed with the supervisor within five days (or such longer period

although the parties' pleadings in the case included the "within or outside" language in discussing whether royalty payments were due for oil and gas used in leasehold operations, its significance was not focused on. 25/ The court's opinion quotes the royalty provisions excepting "gas used for purposes of production from and operations upon the leased area" from royalties and characterizes the 1974 notices it deemed invalid as requiring lessees "to pay a royalty on oil and gas which are * * * used in leasehold operations," 26/ but does not indicate whether it considered off-lease-use to be covered by those notices. Exxon argues the July 1982 notice "was an attempt to limit the scope of Amoco to the facts in that case rather than concede to the

fn. 24 (continued)

as the supervisor may approve) after the oil has been run by pipeline or by other means of transportation. Such evidence shall be signed by representatives of the lessee and of the purchaser or the transporter who have witnessed the measurements reported, and the determinations of gravity, temperature, and the percentage of impurities contained in the oil shall be shown.

"§ 250.66 Royalty on unprocessed gas.

"If gas, either gas-well gas or casinghead gas, is sold without processing for the recovery of constituent products, the royalty thereon shall be the percentage established by the terms of the lease of the value or amount of the gas produced."

25/ "The 'within or outside' language, then, is not new language 'unintentionally' added in the NTL published May 13, 1982. The language was present in the 1980 notice which ultimately was the only notice at issue in the Amoco v. Andrus case. See Memorandum in Support of Plaintiffs' Motion for Summary Judgment, pp. 1, 3, 9, 10; Memorandum in Support of Defendant's Motion for Summary Judgment, p. 8. Interestingly enough, nowhere in either plaintiffs' or defendants' brief was there any discussion of the meaning or significance of the words 'within or outside.' Instead, they were merely quoted, with no reflection concerning their import. Plaintiffs argued, for instance, that 'the government still insists, erroneously, that under leases issued subsequent to July 1, 1974, "royalty is due on oil and gas used for purposes of production from and operations within or outside the lease unit area." Plaintiffs contend that this requirement is unlawful."

Statement of Reasons of Gulf Oil Corporation, supra note 12, at 9-10. See also, the Answer of MMS at 32-34 discussing the language used in the parties' pleadings in Amoco Production Co., supra.

26/ Amoco Production Co. v. Andrus, supra at 791. (Emphasis added.)

broader applicability indicated by the reasoning of the court in Amoco which was reflected in the May 1982 NTL." 27/ That may be so, but before we can decide whether that was proper or whether Amoco should apply to these appeals we must know the facts about whether and under what circumstances use of oil or gas for production or operations off the lease or unit from which it was produced was exempted from royalties by the Department, and whether the Congress was aware of that practice so that it may be presumed to have intended that it continue to be followed. 28/

Therefore, these appeals are referred to the Hearings Division for assignment to an Administrative Law Judge in accordance with 43 CFR 4.415. The parties are requested to present evidence on whether oil or gas (or both) was exempted by the Department before July 1, 1974, from the payment of royalties if used for production or operations outside the lease or unit area from which it was produced, and, if so, for what purposes and outside of what kinds of units it was exempt and whether the Congress was aware of the exemptions. 29/ The Administrative Law Judge shall make findings of fact and conclusions of law as necessary in order to decide under what circumstances, if

27/ Notice of Appeal of Exxon Corporation, supra note 13, at 3.

28/ Documentary evidence of the practice and of Congressional awareness of it is, of course, preferred. Cf. Amoco Production Co., supra at 793.

If there was no established practice, or if it cannot be said that the Congress intended to perpetuate it, then the question of whether off-lease use gas should be subject to royalty will be a matter of first impression that will be resolved by the Administrative Law Judge or the Board. See Peabody Coal Co., 93 IBLA 317, 323-24, 93 I.D. 394, 397-98 (1986). We would not be bound by a practice if it were not a matter that the Congress adopted. Id.

29/ For examples of kinds of purposes and kinds of units that could be involved, see NTL-4A, 44 FR 76600 (Dec. 27, 1979).

any, oil or gas produced under section 8 leases may be exempted from the payment of royalties. Absent timely appeal to the Board, the Administrative Law Judge's decision shall be final for the Department.

Will A. Irwin
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

